132-5-31

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1301.

THE PACIFIC EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

MALIN AND COLVIN, A FIRM COMPOSED OF SAM. MALIN AND GEORGE COLVIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED OCTOBER 7, 1889.

SUPREME COURT OF THE UNITED STATES.

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a [The Seal of the U. S. Circuit Court, El Paso, Western Dist. Texas.]

In the Circuit Court of the United States for the Western District of Texas, at El Paso, Texas.

MALIN and COLVIN, Plaintiffs,
vs.
THE PACIFIC EXPRESS Co., Defendant.

Transcript of record and proceedings made as required by writ of error filed herein, finished this 5th day of December, A. D. 1888, and forwarded to J. M. McCormick, Dallas, Tex., this 6th day of December, A. D. 1888.

[The Seal of the U. S. Circuit Court, El Paso, Western Dist. Texas.]

W. E. TURNER, *Clerk*,
By C. A. RICHARDSON, *Deputy*.

1 MALIN and COLVIN, Plaintiffs,
vs.
THE PACIFIC EXPRESS Co., Defendant.

From Mitchell county.

Applied for by Ball and Burney on the 1st day of February, A. D. 1887, and delivered to Ball and Burney, att'ys for def't, on the 2nd day of April, A. D. 1887.

[Seal of District Court, Mitchell Co.]

J. E. HOOPER,
Clerk District Court, Mitchell County, Texas.

2 THE STATE OF TEXAS,
County of Mitchell.

At a term of the district court begun and holden at Colorado, within and for the county of Mitchell, before the Hon. Wm. Kennedy, and ending on the 22nd day of January, A. D. 1887, the following case came on for trial, to wit:

MALIN and COLVIN
vs.
PACIFIC EXPRESS COMPANY. } No. 371.

Plaintiffs' Original Petition.

THE STATE OF TEXAS,
Mitchell County.

In the District Court of Mitchell County. December Term, 1886.

To the Honorable William Kennedy, judge of the 32nd judicial district of Texas, holding sessions in and for Mitchell county, Texas:

The petition of Sam. Malin and George Colvin, partners doing

business under the firm name and style of Malin & Colvin, in Colorado, Mitchell county, Texas, plaintiffs, against The Pacific Express Company, defendant, respectfully represents that plaintiffs are resident citizens of Mitchell county, in the State of Texas, and that defendant is a private corporation, duly incorporated, which has now and at and before the date of plaintiffs' cause of action hereinafter set
3 forth had an agency and was then and is now transacting business in the town of Colorado, Mitchell county, Texas, and has now at said town a local representative, whose name is Miles Hanchett; that plaintiffs' cause of action, which is hereinafter set forth, arose in Mitchell county, in the State of Texas; that heretofore, to wit, on or about the 17th day of June, 1886, the said plaintiffs were the proprietors of and conducting and carrying on as their business and for profit and public convenience a livery stable in the town of Colorado, Mitchell county, Texas, in which stable plaintiffs owned and kept for use and hire sundry carriages, buggies, horses, buggy poles, buggy shafts, double and single harness, saddles, bridles, blankets, blacksmiths' tools, stable lamps, one cutting box, one safe, one desk, six office chairs, one office lamp, buggy and carriage whips, summer and winter lap robes, bed-room furniture and clothing, and large quantities of oats and hay and various and sundry other articles of personal property; all which were necessary for and were used by said plaintiffs in and about their said business of carrying on and conducting a livery stable; that at the same time and place, to wit, the said town of Colorado, the said defendant was carry-
4 ing on the business of an express company, and, among other things, was then and there engaged in delivering to the consignees thereof by means of a delivery wagon and horse belonging to said defendant, which was driven by one Frank Rickard, who was then and there an agent and servant of the said defendant, various and sundry boxes, packages, and parcels of goods shipped by and through the Texas and Pacific Railway Company from the railroad station in Colorado to the places of business and houses of the said consignees.

That on or about said 17th day of June, 1886, on which day the train of the Texas and Pacific railway, from which the said defendant received goods for delivery to the consignees thereof in Colorado, arrived in said Colorado late at night, to wit, about half past eleven o'clock at night, the said defendant, on its delivery wagon as aforesaid and by its said agent, the driver aforesaid, received from the railroad cars at the station in Colorado sundry boxes, parcels, and packages and piled the same on its said delivery wagon to a great height; that the hour was then late and the said Frank Rickard, the driver of said delivery horse and wagon, who was then the agent and servant of the said defendant and was then and there and in all the acts and doings hereinbefore and hereinafter set forth
5 acting in the execution of the business of the said defendant and within the scope of his employment, did not deliver the said boxes, parcels, and packages on the said wagon of the said defendant to their consignees, but drove said horse and wagon, to remain for the night and until the next morning, into the said livery

stable of the said plaintiffs, in which stable the said defendant, by its said driver and agent, had for some time, to wit, for six months before, been boarding said horse and keeping said wagon at night time and when not employed in delivering goods as aforesaid; that in said stable at said time and place a lamp was hanging, which lamp was entirely surrounded and covered by a glass enclosure, which said lamp was then and had been used by plaintiffs to light said stable at night for, to wit, six months or more previous to said time, which said lamp was in all respects safe and safely located, and the situation and location of said lamp and the height from the ground at which it was hung was well know- to the driver of the said horse and wagon.

That the said driver of the said horse and wagon, acting as aforesaid for and in the execution of the business and duty of the said defendant and within the scope of the employment and duty of him, the said driver and agent, so negligently, carelessly, and reck-
6 lessly drove said horse and wagon into said stable with the said boxes and packages and parcels so carelessly, negligently, and recklessly loaded on said wagon that some of said packages, boxes, or parcels violently struck and turned over the said lamp so as aforesaid hanging in said stable, so that said lamp, being then lighted, was turned bottom upward and the glass case or enclosure surrounding the same knocked open and the flame from said lamp immediately communicated to the hay which was stored in the loft of the said livery stable, and the said stable and its contents consumed by fire, which fire these plaintiffs charge was caused alone by the negligence, carelessness, and recklessness of the said defendant, through its said agent, servant, and employee, the said Frank Rickard, the driver of said horse and wagon, and in reference to which these plaintiffs were and are entirely free from negligence in any degree.

That by said fire so caused by the negligence, carelessness, and recklessness of the said defendant, through its said agent and employee, these plaintiffs were greatly damaged and the following property of the said plaintiffs, of the value hereinafter set forth, was totally destroyed, to wit:

One carriage of the value of three hundred and fifty dollars	$350 00
One carriage of the value of two hundred and fifty dollars	250 00
7 Four pole buggies of the value of eight hundred dollars	800 00
One single buggy of the value of one hundred and fifty dollars	150 00
Three buggy poles of the value of thirty dollars	30 00
Two buggy shafts of the value of fifteen dollars	15 00
Seven sets of double harness of the value of forty dollars p'r set, in all of the value of two hundred and eighty dollars	280 00
Ten sets of single harness of the value of twenty-five dollars p'r set, in all of the value of two hundred and fifty dollars	250 00

Six saddles of the value of twenty-five dollars each, in all of the value of one hundred and fifty dollars	150 00
Blankets and bridles of the value of twenty-five dollars	25 00
One set of blacksmith's tools of the value of two hundred dollars	200 00
Two stable lamps of the value of twenty-five dollars	25 00
One cutting box of the value of thirty-five dollars	35 00
Three horses of the value of five hundred and fifty dollars	550 00
One car-load of oats of the value of three hundred and sixty dollars	360 00
Two car-loads of hay of the value of two hundred and seventy-five dollars	275 00
One safe of the value of two hundred dollars	200 00
8 One desk of the value of forty dollars	40 00
Six office chairs of the value of nine dollars	9 00
One office lamp of the value of six dollars	6 00
Two dozen buggy whips of the value of twenty-five dollars	25 00
Six winter lap robes of the value of thirty dollars	30 00
12 summer lap robes of the value — fifteen dollars	15 00
Bed-room furniture, clothing, &c. (in a room in said stable occupied as a sleeping and living room by said plaintiffs), of the value of twelve hundred dollars	1,200 00
Plaintiff, further represent that by reason of said fire caused as aforesaid one horse in said stable was permanently injured (though he was not killed) to the extent of a loss in his value of one hundred dollars	100 00
And that the books, papers, and accounts of these plaintiffs against their customers were destroyed, so that plaintiffs have lost by reason of loss of evidence thereby the sum of six hundred dollars	600 00
And so these plaintiffs say that by reason of said fire so caused, as hereinbefore set forth, by the said defendant these plaintiffs have been damaged in the sum of, to wit, five thousand nine hundred and seventy dollars as actual damages.	$5,970 00

9 Wherefore the said plaintiffs bring this suit and pray that the said defendants may be summoned by service of proper legal process upon its said local agent and representative (the said Miles Hanchett), in the town of Colorado, Mitchell county, Texas, and after due proceedings herein had that the said plaintiffs may have judgment against the said defendant for the said sum of five thousand nine hundred and seventy dollars as damages and for all costs of this suit, and for all such other and further relief as the said plaintiffs may be entitled to in the premises, in law or equity.

SEXTON & SMITH,
Att'ys for Pl'ffs.

Endorsed: No. 371. Malin and Colvin *vs.* The Pacific Express Company. Plaintiffs' original petition. Filed Oct. 14th, 1886. J. E. Hooper, C. D. C., M. Co., T.

10 *Citation.*

The State of Texas to the sheriff or any constable of Mitchell county, Greeting:

You are hereby commanded to summon the Pacific Express Company, through its local agent and representative at Colorado, Mitchell county, Texas, one Miles Hanchett, to be and appear before the honorable district court of Mitchell county, Texas, at the next regular term thereof to be holden at the court-house in Colorado on the 15th Monday after the first Monday in September, A. D. 1886, then and there to answer the plaintiffs' petition filed in said court on the 14th day of October, A. D. 1886, wherein Malin and Colvin, a firm composed of Sam. Malin and George Colvin, are plaintiffs and The Pacific Express Company is defendant; file number of said suit being No. 371. The nature of plaintiffs' demand is as follows, to wit: Suit for the sum of $5,970.00 damages done these pl'ffs by the careless overturning of a burning lamp in the livery stable of pl'ffs by one Frank Rickard, an agent and servant of the d'f't Co., whereby the said stable and a large number of vehicles, stock, and various other articles of value was destroyed by fire on or about the 17th day of June, A. D. 1886; and you will deliver to said Miles Hanchett, local agent and representative at Colorado, Texas, for said defendant Co., in person, a true copy of this citation.

11 Herein fail not, but have you then and there this writ with your endorsement thereon showing how you have executed the same.

Attest J. E. Hooper, clerk of the district court of Mitchell county, Texas.

Given under my hand & seal of said court, at office, in Colorado, this the 20th day of October, A. D. 1886.

J. E. HOOPER,

[SEAL.] *Clerk District Court, Mitchell County, Texas.*

Sheriff's Return.

Came to hand the 21st day of October, A. D. 1886, at 9 o'clock a. m. and executed the 21st day of October at 2 o'clock p. m., A. D. 1886, by delivering to Miles Hanchett, in person, the local agent and representative of the defendant, The Pacific Express Company, at Colorado, Mitchell county, Texas, at the office of said company, in said town and county, a true copy of this writ.

Fees, serving one copy, $1.50.

R. C. WARE,
Sheriff Mitchell County, Texas.

Endorsed: No. 371. Malin and Colvin *vs.* The Pacific Express Company. Citation. Issued October 20th, 1886. J. E. Hooper, district clerk. Filed the 21st day of October, 1886. J. E. Hooper, clerk, by C. B. Hooper, deputy.

12 *Original Answer.*

In District Court, Mitchell County, Texas. Dec. Term, 1886.

MALIN & COLVIN
vs.
THE PACIFIC EXPRESS COMPANY. } No. 271.

Now comes the defendant in the above-entitled cause, and, appearing for the purpose of this plea only, says that before and at the time of the commencement of this suit and the pretended service of process herein the said defendant was and is now a corporation duly incorporated under the laws of the State of Nebraska, and had then and still has its domicile in said State, and was and is now a resident thereof, and not of the State of Texas or any county thereof; that defendant has never been incorporated under the laws of the State of Texas or of the United States; and defendant says it has never promised to pay the demand claimed in this suit in the State of Texas.

Wherefore defendant claims right to be sued in the courts of the State of its said domicile, to wit, in the State of Nebraska, and prays judgment whether this court will take further cognizance of this suit.

LINDSEY AND McCORMICK AND
BALL AND BURNEY,
Att'ys for D'f'd't.

I, Joy H. Burney, as attorney for defendant, do solemnly swear that the foregoing plea is true in substance and in fact.

JOY H. BURNEY.

Sworn to and subscribed before me this 24th day of December, A. D. 1886.

[SEAL.] R. L. BOREN,
Notary Public, Mitchell County, Texas.

13 And, appearing further for the purpose only of excepting to the pretended citation herein, defendant says the same is insufficient in this following and many other particulars to require it to answer at this term of this court, and moves to quash the same because it does not set forth nor state the nature of plaintiffs' demand with sufficient certainty; that it is too general to apprise the defendant of the character of the demand and the material particulars of the claim against it; and of this it prays judgment of the court.

LINDSEY AND McCORMICK AND
BALL AND BURNEY,
Att'ys for D'f'd't.

And in the event the above plea and exception is overruled by the court, and in that event only, comes now the defendant and ex-

cepts to plaintiffs' original petition herein, and says the same is insufficient in law to require it to answer thereto; and of this it prays the judgment of the court.

BALL & BURNEY AND
LINDSEY AND McCORMICK,
Att'ys for D'f'd't.

And, for plea in this behalf, the defendant, by its att'ys, denies all and singular the allegations in plaintiffs' petition; and of this it puts itself upon the country.

BALL AND BURNEY AND
LINDSEY & McCORMICK,
Att'ys for D'f'd't.

Endorsed: No. 271. Malin and Colvin *vs.* The Pacific Express Company. Original answer. Filed Dec. 24th, 1886. J. E. Hooper, C. D. C. Ball & Burney and Lindsey and McCormick, att'ys for D.

14 *Petition to Remove Cause.*

In the District Court of Mitchell County, State of Texas.

MALIN and COLVIN
vs.
THE PACIFIC EXPRESS CO. } No. 271.

Petition for the removal of suit to the circuit court of the United States for the western district of Texas, at El Paso.

To the honorable district court of Mitchell county, Texas:

Your petitioner, The Pacific Express Co., respectfully shows to this honorable court that it is the defendant in the above-entitled cause; that the matter and amount in dispute in said cause exceeds, exclusive of costs, the sum or value of five hundred dollars; that in said suit there is a controversy between citizens of different States, and that your petitioner was at the time of the commencement of this suit and still is a citizen of the State of Nebraska, it being a corporation created under and by the laws of said State, and that the said Malin & Colvin, a firm composed of Sam. Malvin and George Colvin, plaintiffs in said cause, were then and still are citizens of the State of Texas.

And your petitioner further represents that this suit has not been tried, but is now pending for trial in the district court of the State of Texas for the county of Mitchell, and that your petitioner desires to remove the same into the circuit court of the United States for the western district of Texas, at El Paso, in pursuance of the act of Congress in that behalf provided; and your petitioner offers
15 herewith a bond, with good and sufficient surety, conditioned for its entering in said circuit court of the United States for the western district of Texas, at El Paso, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said bond and surety and to cause the record herein to be removed into said circuit court of the United States in and for the western district of Texas, at El Paso; and your petitioner will ever pray, etc.

BALL AND BURNEY AND
LINDSLEY AND McCORMICK,
Attorneys for Petitioner.

Endorsed: No. 371. Malin and Colvin *vs.* The Pacific Express Co. Petition to remove cause. Filed this the 4th day of Jan'y, 1887. J. E. Hooper, clerk. Ball and Burney and Lindsley and McCormick, attorneys for petitioner.

16 *Bond to Remove Cause.*

Know all men by these presents that the undersigned, The Pacific Express Company, as principal, and J. C. O'Conner and Philip Sanger, as sureties, are held and firmly bound unto Malin & Colvin in the penal sum of five hundred dollars; for the payment whereof, well and truly to be made unto the said Malin & Colvin, their heirs and —, we bind ourselves, our heirs, successors, and representatives, jointly and severally, firmly by these presents; yet upon these conditions: The said The Pacific Express Company having petitioned the district court of Mitchell county, State of Texas, for the removal of a certain cause therein pending, wherein Malin & Colvin are plaintiffs and The Pacific Express Company is defendant, to the circuit court of the United States in and for the western district of Texas, at El Paso: Now, if the said petitioner, The Pacific Express Company, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands this 21st day of December, 1886.

THE PACIFIC EXPRESS COMPANY,
By LINDSLEY & McCORMICK, *Its Att'ys.*
J. C. O'CONNER.
PHILIP SANGER.

17 STATE OF TEXAS, }
County of Dallas. }

I, Henry W. Jones, clerk of the district court in and for said county and State, do hereby certify that the above bond is good and solvent and would be approved by me if offered in a suit in this court.

H. W. JONES,
Clerk of the Dist. Court, Dallas County, Texas,
[SEAL.] By J. H. STEWART, *Deputy.*

Endorsed: No. 371. Malin & Colvin *vs.* The Pacific Express Co. Bond to remove cause. Filed this the 4th day of Jan'y, 1887. J. E. Hooper, clerk. Ball and Burney and Lindsley and McCormick, attorneys for petitioner.

18 *Order of Removal. Jan'y 6th,* 1887.

MALIN and COLVIN
vs.
THE PACIFIC EXPRESS CO. } No. 371.

This cause coming on to be heard upon the petition of the defendant, The Pacific Express Company, to remove said cause to the circuit court of the United States for the western district of Texas, at El Paso, for trial, and the court having seen, heard, and considered said petition and the bond filed by said defendant, The Pacific Express Company, with J. C. O'Conner and Philip Sanger as sureties, the court is of the opinion that said petition is sufficient, and does hereby approve said bond, and is satisfied that said sureties are solvent and that said bond is sufficient, and does hereby approve and accept said bond; it is therefore considered that this court proceed no further in this cause and that said cause be removed to the circuit court of the United States for the western district of Texas, at El Paso, for trial in accordance with the statutes of the United States in such cases made and provided.

19 *Bill of Costs.*

MALIN and COLVIN
vs.
PACIFIC EXPRESS COMPANY. } No. 371.

Docketing cause		20
Citation & copy		1 50
Ent. appearance		30
Filing papers, 5		75
Approving bond		1 50
Ent. order		1 50
Tax costs		25
Docketing motion		15
		6 15
Transcript, 4,500 words		9 00
Total clerk's fees		$15 15
Sheriff's costs:		
Citation	1 50	
Jury fee	50	
		2 00
Total cost bill		$17 15

THE STATE OF TEXAS, }
County of Mitchell, }

I, J. E. Hooper, clerk of the district court in and for said county, do hereby certify that the above and foregoing is a true and correct transcript of all proceedings had in cause No. 371, Malin and Colvin *vs.* The Pacific Express Company; also a true and correct bill of costs in said cause.

Witness my hand and the seal of said court, at Colorado, this 14th day of February, A. D. 1887.

[SEAL.] J. E. HOOPER,
District Clerk, Mitchell County, Texas.

Endorsed: No. 27. Malin & Colvin, plaintiffs, *vs.* The Pacific Express Company, defendant. Filed Ap'l 4, 1887. W. E. Turner, clerk.

20 *Subpœna for Witness.*

Circuit Court of the United States for the Western District of Texas, at El Paso, Holding Sessions.

The President of the United States to the marshal of the western district of Texas, Greeting:

You are hereby commanded to subpœna Chas. Gilbert, F. M. Hickerson, and Samuel Ross to be and appear before the circuit court of the United States for the western district of Texas, holding sessions at El Paso, Texas, to be holden at the city of El Paso on the first Monday of October next, A. D. 1887, then and there to testify on behalf of defendant in a certain cause therein wherein Malin and Colvin are plaintiffs and Pacific Express Company *who* is defendant, and in this the witness is not to fail under the penalty of two hundred and fifty dollars.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at El Paso, Texas, this 14th day of July, A. D. 1887.

[SEAL.] W. E. TURNER, *Clerk.*

Endorsed: No. 27. In the United States circuit court, western district of Texas, El Paso sessions. Malin and Colvin *vs.* Pacific Express Co. Subpœna to Chas. Gilbert *et al.* Issued 14th day of July, A. D. 1887. W. E. Turner, clerk. Filed 26th July, A. D. 1887. W. E. Turner, clerk.

21 Received this 14 day of July, A. D. 1887. Executed this 24 day of July, A. D. 1887, by reading to each of the within-named witnesses this subpœna.

JOHN T. RANKIN,
U. S. Marshal, Western District of Texas,
By W. H. VAN RIPER, *Deputy.*

Subpœna for Witness.

Circuit Court of the United States for the Western District of Texas, at El Paso, Holding Sessions.

The President of the United States to the marshal of the western district of Texas, Greeting:

You are hereby commanded to subpœna G. Y. McWilliams, of El Paso, to be and appear before the circuit court of the United States for the western district of Texas, holding sessions at El Paso, to be holden at the city of El Paso *instanter*, then and there to testify in behalf of the defendant in a certain cause therein wherein Malin and Colvin are plaintiffs and Pacific Express Company is defendant, and in this the witness is not to fail under the penalty of two hundred and fifty dollars.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at El Paso, Texas, this 6 day of Oct., A. D. 1887.

[SEAL.] W. E. TURNER, *Clerk.*

[Endorsed:] No. 27. In the United States circuit court, western district of Texas, El Paso sessions. Malin and Colvin *vs.* Pacific Express Co. Subpœna to G. Y. McWilliams. Issued 6 day of Oct., A. D. 1887. W. E. Turner, clerk.

22 Received this 6 day of Oct., A. D. 1887; not executed this 6 day — Oct., A. D. 1887; witness in New Mexico—Las Cruces.

RANKIN,
U. S. M., Western District of Texas,
By WEST, *Deputy.*

Filed 6 day of Oct., A. D. 1887.

W. E. TURNER, *Clerk.*

Subpœna for Witness.

Circuit Court of the United States for the Western District of Texas, at El Paso, Holding Sessions.

The President of the United States to the marshal of the western district of Texas, Greeting:

You are hereby commanded to summon A. W. Dunn, C. C. Blandford, and George Gorbett to be and appear before the circuit court of the United States for the western district of Texas, holding sessions at El Paso, to be holden at the city of El Paso on the *instanter* day of Oct. next, A. D. 1887, then and there to testify in behalf of plaintiff in a certain cause therein wherein Malin and Colvin are plaintiffs and Pacific Express Company is defendant, and in this the witness is not to fail under the penalty of two hundred and fifty dollars.

Witness the Honorable Morrison R. Waite, Chief Justice of the

Supreme Court of the United States, and the seal of said circuit court, at El Paso, Texas, this 8 day of Oct., A. D. 1887.

W. E. TURNER, *Clerk.* [SEAL.]

[Endorsed:] No. 27. In the United States circuit court, western district of Texas, El Paso sessions. Malin and Colvin *vs.* Pacific Express Co. Subpœna to A. W. Dunn *et al.* Issued 8 day of Oct., A. D. 1887. W. E. Turner, clerk.

23 Received this 8th day of October, A. D. 1887. Executed this 8th day of Oct., A. D. 1887, by reading to the within-named witness this subpœna.

JOHN T. RANKIN,
U. S. M., Western District of Texas,
By CHAS. B. PATTERSON, *Deputy.*

Filed 8th day of Oct., A. D. 1887.

W. E. TURNER, *Clerk.*

Subpœna for Witness.

Circuit Court of the United States for the Western District of Texas, at El Paso, Holding Sessions.

The President of the United States to the marshal of the western district of Texas, Greeting:

You are hereby commanded to summon G. Y. McWilliams and F. J. Rickard to be and appear before the circuit court of the United States for the western district of Texas, holding sessions at El Paso, to be holden at the city of El Paso on the *instanter* — next, A. D. 1887, then and there to testify on behalf of defendant in a certain cause therein wherein Malin and Colvin are plaintiffs *versus* Pacific Express Company, who is defendant, and in this the witness is not to fail under the penalty of two hundred and fifty dollars.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at El Paso, Texas, this 3rd day of Oct., A. D. 1887.

[SEAL.] W. E. TURNER, *Clerk.*

[Endorsed:] No. 27. In the United States circuit court, western district of Texas, El Paso sessions. Malin and Colvin *vs.* Pacific Exp. Co. Subpœna to G. Y. McWilliams *et al.* Issued 3 day of Oct., A. D. 1887. W. E. Turner, clerk.

24 Received this 3 day of Oct., A. D. 1887. Executed this 3 day of Oct., A. D. 1887, by reading to the within-named witness this subpœna—Frank Rickard; G. Y. McWilliams not found.

JOHN T. RANKIN,
U. S. M., Western District of Texas,
By W. D. GOOCH, *Deputy.*

Defendants' First Amended Original Answer.

In U. S. Circuit Court for the Western Dist. of Tex., at El Paso.
April Term, 1888.

MALIN & COLVIN
vs.
THE PACIFIC EXPRESS CO. } No. 27.

Now comes The Pacific Express Co., defendant in the above cause, and, leave of the court being first had and obtained, files this its first amended original answer in lieu of its original answer filed herein on Dec. 24th, 1886, and for amendment says—

That plaintiffs' original petition herein is insufficient in law to require this defendant to make further answer thereto, and of this defendant prays judgment of the court.

And for special exceptions to plaintiffs' original petition herein defendant says the same is insufficient in each of the following particulars:

1st. Because said petition shows on its face that plaintiffs' own negligence contributed to the injury complained of.

2nd. Because the injury therein complained of is not alleged to have been the proximate result of the negligence charged against defendant.

3rd. Because the alleged negligence of defendant is not charged to have been and it appears from said petition that it was not the natural & proximate cause of the injury, but the remote and distant cause.

25 4th. Because it does not appear from said petition that this defendant is or can be held liable for the negligence of F. J. Rickard.

5th. Because it does not appear that negligent acts of said F. J. Rickard were done within the scope of his authority or business, and because wherein said petition charges that the negligence of said Rickard was wanton and wilful the same is not binding on defendant.

6th. Because the property therein charged to have been destroyed is not as to any item thereof, or at least not as to all items, sufficiently described, and not described with such accuracy as to admit proof of the same or identication thereof.

And of each of said special exceptions defendant prays judgment of the court.

McCORMICK AND SPENCE AND
BALL AND BURNEY,
Att'ys for Def't.

And for plea herein defendant denies all and singular the allegations contained in pl'ffs' petition and demands strict proof of the same.

McCORMICK AND SPENCE AND
BALL AND BURNEY,
Att'ys for Def't.

And, further answering herein, defendant says that if the property alleged to have been destroyed was in fact destroyed, such destruction was not caused by any negligence on the part of defendant, but by the negligence of plaintiffs themselves and by their contributory negligence, because defendant avers that at the time and
26 place when and where the fire described in plaintiffs' petition occurred and in the stable therein described plaintiffs had an oil lamp so negligently constructed, arranged, and suspended as greatly to endanger said stable and the property therein contained, which plaintiffs in this case charge to have been destroyed and for the value of which they sue; that said lamp was suspended just beneath the loft of said stable in the rear part thereof and so near to the ceiling as to endanger the same, and said ceiling was composed of a very dry, combustible material, and just over said lamp, and in a few inches thereof, there was a large crack or opening through which a quantity of dry hay was hanging and exposed, and in said loft a large quantity of hay, fodder, shucks, and other highly combustible material was stored; that said lamp was filled with a highly inflammable and explosive oil. Defendant charges that it was gross negligence to have said property thus exposed to danger by fire; that when said lamp was jostled and caused to flame up by any passing vehicle or breeze said hay was so negligently exposed by plaintiff- as to endanger said property at all times; but defendant says that on the occasion named in plaintiffs' petition no fire would have taken place by reason of any act of defendant, but defendant says that if the property described in plaintiffs' petition was destroyed as therein charged the same was directly caused by the negligent acts of Jube Johnson, then and there an agent of Malin
27 & Colvin, plaintiffs, and in charge of and controlling said property on said night, who, after defendant's servant had driven into said stable and against said lamp and caused the same to blaze up if such occurred, and before said fire took place, seized said lamp and the fastenings thereof and handled the same in such a careless and negligent manner as to bring the flames therefrom in contact with hay which was above the same and exposed as aforesaid, and thereby caused the conflagration; whereas if said lamp had not been touched by said Johnson, or if he had handled the same with ordinary care or prudence, the flames therefrom could have been extinguished without damage to plaintiff; all of which defendant is ready to verify and puts itself upon the country.

McCORMICK AND SPENCE AND
BALL AND BURNEY,
Att'ys for D'f'd't.

Endorsed: No. 27. Malin & Colvin *vs.* The Pacific Express Company. Def'd't's first amended original answer. Filed April 5, 1888. W. E. Turner, clerk. Ball and Burney and McCormick and Spence, att'ys for d'f'd't.

28 *Pl'ffs' Application for Subpœna.*

MALIN & COLVIN
vs.
THE PACIFIC EXPRESS CO.

Please issue subpœna for V. F. Cook on behalf of pl'ffs in the above case.

F. B. SEXTON,
Att'y for Pl'ffs.

Oct. 1, 1888.

Endorsed: No. 27. Pl'ffs' app. for sub. Malin and Colvin *vs.* Pac. Ex. Co. Filed and issued Oct. 1st, 1888. W. E. Turner, clerk, by C. A. Richardson, deputy.

Subpœna for Witness.

Circuit Court of the United States for the Western District of Texas, at El Paso, Holding Sessions.

The President of the United States to the marshal of the western district of Texas, Greeting:

You are hereby commanded to subpœna V. F. Cook to be and appear before the circuit court of the United States for the western district of Texas, holding sessions at El Paso, to be holden at the city of El Paso on the first Tuesday of October next, A. D. 1888, it being 2nd day of Oct., A. D. 1888, then and there to testify in behalf of plaintiffs in a certain cause therein wherein Malin and Colvin are plaintiffs *versus* The Pacific Express Company, who is defendant; and in this the witness is not to fail under the penalty of two hundred and fifty dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at El Paso, Texas, this 1st day of October, A. D. 1888.

29 W. E. TURNER, *Clerk*,
[SEAL.] By C. A. RICHARDSON, *Deputy*.

[Endorsed:] No. 27. In the United States circuit court, western district of Texas, El Paso sessions. Malin and Colvin *vs.* Pacific Express Co. Subpœna to V. F. Cook. Issued 1st day of October, A. D. 1888. W. E. Turner, clerk, by C. A. Richardson, deputy.

Received this first day of October, A. D. 1888. Executed this first day of October, A. D. 1888, by reading to the within-named witness this subpœna.

JOHN T. RANKIN,
U. S. M., Western District of Texas,
By ROB. C. ROSS, *Deputy*.

Filed Oct. 1st, 1888.

W. E. TURNER, *Clerk*,
By C. A. RICHARDSON, *Deputy*.

Plaintiff's First Amended Original Petition.

In the Circuit Court of the United States for the Western District of Texas, at El Paso. October Term, A. D. 1888.

MALIN & COLVIN, Plaintiff,
vs.
THE PACIFIC EXPRESS COMPANY, Defendant. } No. 27.

Leave of the court being first had and obtained, the plaintiffs come into court and file this their first amended orlginal petition and say:

The petition of Sam. Malin and George Colvin, partners doing business under the firm name and style of Malin & Colvin, in Colorado, Mitchell county, Texas, plaintiffs, against The Pacific Express Company, defendant, respectfully represents that plaintiffs are resident citizens of Mitchell county, in the State of Texas, and that defendant is a private corporation, duly incorporated, which
30 has now and at and before the date of plaintiffs' cause of action hereinafter set forth had an agency, and was then and is now transacting business in the town of Colorado, Mitchell county, Texas, and has now at said town a local representative, whose name is Miles Hanchett; that plaintiffs' cause of action, which is hereinafter set forth, arose in Mitchell county, in the State of Texas.

That heretofore, to wit, on or about the 17th day of June, 1886, the said plaintiffs were the proprietors of and conducting and carrying on as their business and for their own profit and for public convenience, a livery stable in the town of Colorado, Mitchell county, Texas, in which State plaintiffs owned and kept for use and hire sundry carriages, buggies, horses, buggy poles, buggy shafts, double and single harness, saddles, bridles, blankets, blacksmiths' tools, stable lamps, one cutting box, one safe, one writing desk, six office chairs, one office lamp, buggy and carriage whips, summer and winter lap robes, bedroom furniture and clothing, and large quantities of oats and hay and various and sundry other articles of personal property, all which were necessary for and were used by said plaintiffs in and about their said business of carrying on and conducting their said livery stable; that at the said time and place, to wit, the said town of Colorado, Mitchell county, Texas, the said defendant was carrying on the business of an express company, and, among other things, was then and there engaged in delivering for hire and compensa-
31 tion by said defendant charged and to said defendant paid, to the consignees thereof, by means of a delivery wagon and horse belonging to said defendant, which said horse and wagon was driven by one Frank Rickard, who was then and there employed by and was an agent and servant of the said defendant, various and sundry boxes, packages, and parcels of goods shipped by and through the Texas and Pacific Railway Company from the railroad station-house or depot of said company in Colorado to the places of business and houses of said consignees.

That on or about the said 17th day of June, 1886, on which day the train of the Texas and Pacific railway from which the said defendant received goods for delivery to the consignees thereof in Colorado arrived in said Colorado late at night, to wit, about half past eleven o'clock at night, the said defendant, on its said delivery wagon as aforesaid and by its said agent, the driver aforesaid, received from the railroad cars at the said station in Colorado, sundry boxes, chicken coops, and other parcels and packages of merchandise, and negligently and carelessly and recklessly loaded and piled the same on its said delivery wagon, by and through its said agent, the said driver, to a great and unusual height; that the hour was then late and the said Frank Rickard, the driver of said delivery horse and wagon, who was then the agent and servant of the said defendant and was then and there and in all the acts and doings hereinbefore and hereinafter set forth and charged acting in the execution of the business of the said defendant and within the scope of his employment and authority, did not, as it was his duty and the duty
32 of the said defendant to do, deliver the said boxes, chicken coops, and other parcels and packages on the said wagon of the said defendant to their consignees, nor did he deposit or store the same for the night in the office or warehouse of the said defendant in Colorado, and the plaintiffs here aver that the said defendant had an office or warehouse or both at said time in Colorado for storing goods received by and in care of said defendant, but that the said Rickard, acting for the said defendant and within the scope of his employment and authority, drove said horse and wagon, with the said boxes, chicken coops, parcels, and other packages as aforesaid, so as aforesaid carelessly, negligently, and recklessly loaded and piled thereon, to remain for the night and until the next morning, into the said livery stable of the said plaintiffs, in which stable the said defendant, by its said driver and agent, had for some time, to wit, for six months before, been boarding and keeping said wagon at night time and when not employed in delivering goods as aforesaid.

That in said stable, at said time and place, a lamp was hanging, which lamp was entirely surrounded and covered by a glass enclosure, which said lamp was then and had been used by plaintiffs to light said stable at night (as it was necessary and proper for plaintiffs in carrying on their business of keeping a livery stable to do) for, to wit, six months or more previous to said time, which said lamp was in all respects safe and safely located and suspended, and the situation and location of said lamp and the height from
33 the ground or floor of said stable at which it was hung was well known to the said driver of the said horse and wagon.

That the said driver of the said horse and wagon, acting as aforesaid for and in the execution of the business and duty of the said defendant and within the scope of the employment, duty, and authority of him, the said driver, at the time and place aforesaid, to wit, in the town of Colorado aforesaid, at or about 12 o'clock of the night of the 17th day of June, 1886, so negligently, carelessly, and

recklessly drove said horse and wagon into said stable, with the said boxes, chicken coops, parcels, and other packages so carelessly, negligently, and carelessly [recklessly] loaded and piled thereon, as aforesaid, that some of said boxes, chicken coops, parcels, and other packages so on said wagon as aforesaid, by means and reason of said careless loading and driving, violently struck and turned over the said lamp so as aforesaid hanging in such stable, so that — lamp, being then and there lighted and burning, was turned over, and the glass case or enclosure surrounding the same was knocked open and the flame from said lamp immediately communicated to the hay and other forage and material which was stored in the loft of the said livery stable, and the said stable and its contents consumed by fire, which fire these plaintiffs aver and charge was caused alone by and was the natural, immediate, proximate, and direct result of the negligence, carelessness, and recklessness of the said defendant through its said agent, servant, and employee, the said Frank Rickard, the
34 driver of said horse and wagon, and in reference to which these plaintiffs were and are entirely free from negligence and towards which said plaintiffs in no manner contributed; that defendant was further guilty of negligence in this, that the said driver, at said time and place aforesaid, was warned by one of plaintiffs' employees not to drive against said lamp with said load as aforesaid thereon, but disregarded said warning and recklessly and negligently drove against and caused said lamp to be turned over and produce said fire by striking the same with some of the boxes, chicken coops, or packages on said wagon carelessly loaded as aforesaid; and further in this, that said driver well knew that the part of said stable into which he drove said wagon was not the usual and proper place for keeping said wagon at night, and was not the part or portion of said stable in which said wagon had been or usually was kept at night or when not in use.

That by said fire so as aforesaid caused alone by the negligence, carelessness, and recklessness of the said defendant, through its said agent, servant, and employee, these plaintiffs are greatly damaged, and the following property of the said plaintiffs, of the value hereinafter set forth, was partially or totally, as hereinafter specified, destroyed, to wit:

Totally destroyed as follows:

One carriage of the value, to wit, of three hundred and fifty dollars	350 00
35 One carriage of the value, to wit, of two hundred and fifty dollars	250 00
Four pole buggies of the value, to wit, of eight hundred dollars	800 00
One single buggy of the value, to wit, of one hundred and fifty dollars	150 00
Three buggy poles of the value, to wit, of thirty dollars	30 00
Two buggy shafts of the value, to wit, of fifteen dollars	15 00
Seven sets of double harness of the value, to wit, of $40 p'r set; in all, of the value, to wit, of two hundred and eighty dollars	280 00

Ten sets of single harness of the value, to wit, of $25 p'r set; in all, of the value, to wit, two hundred and fifty dollars	250 00
Six saddles of the value, to wit, of $25 each; in all, of the value, to wit, of one hundred and fifty dollars	150 00
Blankets and bridles of the value, to wit, of twenty-five dollars	25 00
One set of blacksmiths' tools of the value, to wit, of two hundred dollars	200 00
2 stable lamps of the value, to wit, of twenty-five dollars	25 00
One cutting box of the value, to wit, of thirty-five dollars	35 00
Three horses of the value, to wit, of five hundred and fifty dollars	550 00
One lot of oats and corn of the value, to wit, of four hundred and thirty-four dollars and thirty-eight cents	#434 38
36 Two car-loads of hay of the value, to wit, of two hundred and eighty-seven dollars and thirty-three cents	287 33
One safe of the value, to wit, of two hundred dollars	#200 00
One writing desk of the value of, to wit, forty dollars	40 00
Six office chairs of the value of, to wit, nine dollars	9 00
One office lamp of the value, to wit, of six dollars	6 00
Two dozen buggy whips of the value, to wit, of twenty-five dollars	25 00
Six winter lap robes of the value, to wit, of thirty dollars	30 00
12 summer lap robes of the value, to wit, of fifteen dollars	15 00
Bed-room furniture, clothing, &c. (in a room in said stable occupied as a sleeping and living room by said plaintiffs), consisting of one bed set of the value of $50.00, 1 carpet, $25.00; 1 wardrobe of the value of $15.00, 1 centre table of the value of $15.00, 1 hanging lamp of the value of $4.00, 4 chairs of the value of $5.00, bedding of the value of $50.00, 1 wolf robe of the value of $40.00, aggregating in value $204.00, of the value, to wit, of two hundred and four dollars	204 00
480 lbs. oats, $7.50; 2,750 lbs. corn, $31.90; 2,501 lbs., $36.76; 1 car-load oats, 778¾ bushels, $358.22, in all, to wit	434 38
23,450 lbs. hay, $93.70; freight and drayage on same, $60.63; 21,430 lbs. hay, $75.00; freight and drayage on same, $58.00, in all, to wit	287 33
37 Plaintiffs further represent that by reason of said fire, caused as aforesaid, one horse in said stable was permanently injured (though not killed) to the extent of a loss in his value, to wit, of one hundred dollars	100 00

And so these plaintiffs say that, by reason of said fire so caused as hereinbefore set forth by the said defendant,

these plaintiffs have been damaged in the sum of, to wit, four thousand six hundred and fifty-six dollars and seventy-one cents $4,656 71

as actual damages.

Wherefore the said plaintiffs bring this suit and pray that the said defendant may be summoned by service of proper legal process upon its local agent and representative (the said Miles Hanchett), in the town of Colorado, Mitchell county, Texas, and after due proceedings herein had that the said plaintiffs may have judgment against the said defendant for the said sum of four thousand six hundred and fifty-six dollars and seventy-one cents as damages and for all costs of this suit and for all such other and further relief as the said plaintiffs may be entitled to in the premises in law or equity.

SEXTON & SMITH,
Att'ys for Pl'ffs.

Endorsed: No. 27. Malin & Colvin *vs.* The Pacific Express Co. Plaintiffs' first amended original petition. Filed this 1st day of October, A. D. 1888. W. E. Turner, clerk, by C. A. Richardson, deputy.

38 *Def't's Second Amended Original Answer.*

In Circuit Court of the United States for the Western District of Texas, at El Paso. October Term, 1888.

MALIN & COLVIN *vs.* THE PACIFIC EXPRESS CO. } No. 27.

Now comes Pacific Express Co., defendant, and, having first obtained leave of the court, files this its second amended original answer in lieu of its first amended original answer filed herein on April 5th, 1888, and said defendant says—

That plaintiffs' petition herein is insufficient in law to require the defendant to answer thereto, and of this def't prays judgment, &c.

And def't specially excepts to pl'ffs' petition on the following grounds:

1. Because said petition shows on its face that plaintiffs' own negligence contributed to the injury complained of.

2. Because it does not appear from said petition that this defendant is or can be held liable for the negligence of F. J. Rickard.

3. Because said petition sets out acts of wanton and willful negligence of one Rickard, the alleged agent of defendant, and seeks to charge defendant therewith.

4. Because the bill of particulars in said petition contained of the property alleged to have been destroyed is too vague, uncertain, and indefinite in its description.

And of each of these special exception- defendant prays judgment, &c.

BALL & BURNEY AND
J. M. McCORMICK,
Att'ys for Def't.

And, further answering, defendant denies all and singular the allegations in plaintiffs' petition contained and demands strict proof of the same.

39 And, further answering herein, defendant says that if the property alleged to have been destroyed was in fact destroyed, such destruction was not caused by any negligence on the part of defendant, but by the negligence of plaintiffs themselves and by their (plaintiffs') contributory negligence, because defendant avers that at the time and place when and where the fire described in plaintiffs' petition occurred and in the stable therein described plaintiffs had an oil lamp so negligently constructed, arranged, and suspended as greatly to endanger said stable and the property therein contained, which pl'ffs in this case charge was destroyed and for the value of which they sue; that said lamp was suspended just beneath the loft of said stable, in the rear part thereof, and so near to the ceiling as to endanger the same, and said ceiling was composed of a very dry, combustible material, and just over said lamp and within a few inches thereof there was a large crack or opening in said ceiling through which a quantity of dry hay was hanging and exposed near to said lamp, and in said loft a large quantity of hay, fodder, shucks, and other highly combustible material was stored; that said lamp was filled with a highly inflammable and explosive oil. Defendant charges that plaintiffs were guilty of gross negligence in having said lamp and its surroundings, such as they were, as above set out; that when said lamp was jostled and caused to flame up by any passing vehicle or breeze said hay was so negligently exposed as aforesaid by plaintiffs as to endanger said property at all times; but def't says that on the occasion named in plaintiffs' petition no fire would have taken place by reason of any

40 act of defendant, but defendant says that if the property described in plaintiffs' petition was destroyed, as therein charged, the same was destroyed wholly, entirely, and directly by the negligent acts of Jube Johnson, then and there an agent of plaintiffs and in charge of and controlling said property on said night, who, after defendant's servant had driven into said stable and against said lamp and caused the same to blaze up, if such occurred, and before said fire took place, seized said lamp and the fastenings thereof and handled the same in such a careless and negligent manner as to bring the flames therefrom in contact with hay, which was above the same and exposed as aforesaid, and thereby caused the conflagration; whereas if said lamp had not been touched by said Johnson, or if he had handled the same with ordinary care or prudence, the flames thereof could have been extinguished without danger or damage to plaintiffs; all of which defendant is ready to verify and puts itself upon the country.

And, further answering and by way of counter-claim and reconvention, def't shows that heretofore, to wit, on and before the 17th day of June, 1886, plaintiffs were engaged at the city of Colorado, Texas, in the livery and feed business, as alleged in plaintiffs' petition, and defendant had previous to said last-named day, at the special instance and request of plaintiffs and for and in consideration of a large sum of money paid by defendant to plaintiffs, placed its delivery wagon and horse at plaintiffs' said livery stable
41 for board and attention and care to be furnished by *by* plaintiffs to said horse and wagon and the attachments thereto, and pl'ffs promised def't to furnish proper and safe accom-odations and appliances in carrying on their said business, and that def't's said property would be safe and secure from all injury and damage while in pl'ffs' said premises, and that no damage should accrue to defendant by reason of any careless or negligent acts of pl'ffs or by reason of any negligent, unsafe, or dangerous appliances in said premises; but def't alleges that pl'ffs, disregarding their said promises and obligations, so negligently and careless- kept and conducted their said business and kept a dangerous lamp so negligently and unsafely near to certain hay, straw, &c., that a great fire broke out in said stable, which destroyed said stable and a large portion of the buildings and personal property in said town of Colorado City, and the plaintiffs did thereupon, without probable or adequate cause, institute this suit against def't, and divers other parties have also instituted and still maintain suit against this defendant; that by reason of the premises defendant has been compelled to pay out a large sum of money, to wit, three thousand dollars, for attorneys' fees and expenses in defending this and said other suits; and defendant alleges, whereas, before said fire and the institution of said suits, it, the said defendant, had a high and valuable character as a safe and reliable common carrier of express matter in Texas and throughout the United States, yet by reason of said fire and the institution of said suits as aforesaid by
42 pl'ffs and others growing out of said fire, caused as aforesaid by the negligence of pl'ffs, the reputation of this def't as a safe and reliable common carrier of express matter has become damaged and bad, and defendant has thereby lost custom and business upon which it would have realized a net revenue of, to wit, five thousand dollars.

Wherefore def't says that it has been damaged by reason of the premises in the sum of eight thousand dollars, actual damages, and defendant pleads said damages herein by way of sets-off, counter-claim, and reconvention, and asks for judgment for its said damages and for costs and for general relief.

BALL AND BURNEY AND J. M. McCORMICK.

Endorsed: No. 27. Malin & Colvin *vs.* Pacific Express Co. Def't's second amended original answer. Filed this 5th day of Oct., A. D. 1888. W. E. Turner, clerk. Ball & Burney and J. M. McCormick, att'ys for def't.

43 In the Circuit Court of the United States for the Western District of Texas, at El Paso, Texas.

MALIN and COLVIN
vs.
THE PACIFIC EXPRESS CO. } No. 27.

And now come the plaintiffs and by leave of the court file this their first supplemental petition, and say that they except to the sufficiency of defendant's answer filed October 5th, 1888, and specially to all that part of said answer which sets up or attempts to set up a cross-action against plaintiffs for injury to character and expenses, and say that the same are not sufficient in law, &c.

SEXTON AND SMITH,
Att'ys for Pl'ffs.

Endorsed: No. 27. Malin & Colvin *vs.* The Pacific Express Company. Pl'ffs 1st supplemental petition. Filed this 5th day of Oct., A. D. 1888. W. E. Turner, clerk.

44 U. S. clerk:

Issue subpœna in case of Malin and Colvin *vs.* The Pacific Express Company for J. S. McWilliams, returnable *instanter*, to testify on behalf of defendant.

October 6th, 1888.

R. L. BALL,
Att'y for Defendant.

[Endorsed:] Malin & Colvin *vs.* Pac. Ex. Co. App. for sub. Filed Oct. 6, '88. W. E. Turner, clerk, by C. A. Richardson, dep'y.

Subpœna for Witness.

Circuit Court of the United States for the Western District of Texas, at El Paso, Holding Sessions.

The President of the United States to the marshal of the western district of Texas, Greeting:

You are hereby commanded to subpœna J. S. McWilliams to be and appear before the circuit court of the United States for the western district of Texas, holding sessions at El Paso, to be holden at the city of El Paso *instanter*, then and there to testify in behalf of defendant in a certain cause therein, wherein Malin and Colvin — plaintiffs *versus* Pacific Express Company, who is defendant, and in this the witness is not to fail under the penalty of two hundred and fifty dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at El Paso, Texas, this 6th day of October, A. D. 1888.

W. E. TURNER, *Clerk*,
[SEAL.] By C. A. RICHARDSON, *Deputy.*

[Endorsed:] No. 27. In the United States circuit court, west-
45 ern district of Texas, El Paso sessions. Malin and Colvin *vs.* Pacific Express Company. Subpœna *instanter* to J. S. McWilliams. Issued 6th day of October, A. D. 1888. W. E. Turner, clerk, by C. A. Richardson, d'p'y.

Received this 6 day of Octo., A. D. 1888. Executed same day of Octo., A. D. 1888, by reading to the within-named witness this subpœna.

JOHN T. RANKIN,
U. S. M., Western District of Texas,
By D. WEST, *Deputy.*

Filed this 6 day of Oct., 1888.

W. E. TURNER, *Clerk.*

Charge of the Court.

United States Circuit Court.

MALIN and COLVIN
vs.
THE PACIFIC EXPRESS COMPANY. } No. 27.

GENTLEMEN OF THE JURY: The plaintiffs, Malin and Colvin, seek to recover of the defendant, The Pacific Express Company, damages alleged to have been sustained by them growing out of the destruction by fire of certain property claimed by plaintiffs and contained in a livery stable managed and conducted by them in Colorado, Mitchell county. The plaintiffs allege that the fire occurred on or about the 17th day of June, 1886, and had its origin in the carelessness and negligence of Frank Rickard, who was the agent or servant of defendant and acting within the line and scope of his employment as such agent at the time of the commission of the acts; which acts, plaintiffs claim, render the defendant liable in damages in this suit.

46 By way of defense the defendant first denies generally all the allegations of plaintiffs' petition, and further interposes the plea of contributive negligence on the part of plaintiffs. The first ground of the plea of contributive negligence is in effect that plaintiffs suspended their lamp in the building which was burned in a dangerous place and in such close proximity to hay and other combustible matter stored in the building as to endanger the safety of the building and its contents; and in support of the second ground of contributive negligence the defendant, in his answer, avers that the fire originated from the careless and negligent acts of plaintiffs' servant, Jube Johnson, and that defendant is in no manner responsible therefor.

Touching the responsibility of the master for the acts of his servant, you are charged that for all negligent acts done by the servant in the execution of the master's business and within the scope of the

servant's employment the master is responsible to the person who was injured by such negligent acts, and this upon the principle that when one of two innocent parties must suffer the loss should fall upon him who enabled the wrong to be committed. If, however, the servant when the act was committed was not engaged in the master's business, or if, although engaged in the master's business, he was not acting within the scope of his duties, in such event the master would not be responsible.

47 Looking, then, to the testimony, it is your duty to determine whether Rickard, in driving the express wagon, in plaintiffs' stable, on the night of the 17th day of June, 1886, was engaged in the service of defendant and was then acting within the scope of his employment. If he was so engaged in acting you will inquire into the facts and circumstances as developed by the evidence regarding the fire, which, it is admitt d, occurred on that night. Did the fire originate in the carelessness and negligence of Rickard? And, in this connection, it becomes necessary to define the meaning of the term negligence.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. If, therefore, you believe from the evidence that the fire occurring in the stable of the plaintiffs on the night of the 17th of June grew out of the acts of Rickard, and if you further believe, in view of the foregoing charge, that such acts were negligent, then the defendants would be liable to the plaintiffs for such damage as they may have sustained by reason of the fire. Unless you believe that Jube Johnson was guilty of negligence which contributed directly and proximately to the

48 origin of the fire and the consequent loss and injuries of which plaintiffs complain—that is to say, if Johnson so far contributed to the misfortune by his own negligence or want of ordinary care and caution that but for such negligence or want of care and caution on his part the misfortune would not have happened—then the plaintiff- would not be entitled to recover.

As I have before stated to you, the defendant claims that plaintiffs were guilty of negligence as to the location of the lamp in the building. Upon this point you are instructed that, as the managers of the building, the plaintiffs had the right to place the lamp where, in their own judgment, it would best subserve their own purposes and conveniences, and defendant is not in a position to complain if its own negligence or the negligence of its servants caused the fire.

If, in view of the foregoing instructions and the testimony, you conclude to find a verdict for the plaintiffs, it will then be your duty to determine the amount of damages which they should recover. Upon this point you are charged that the plaintiffs are entitled to recover, if at all, the reasonable market value of such property in Colorado on the 17th day of June, 1886, as the proof shows you was

destroyed, or if any portion of it had no market value at the time and place where it was destroyed, then the plaintiffs would
49 be entitled to recover its real actual value of money at the time and place of its destruction, to wit, on the 17th day of June, 1886, at Colorado, Mitchell county. There is a question between counsel as to the existence of a market for certain articles or items of the property at Colorado on said 17th day of June, and you must satisfy yourselves from the testimony whether there was in fact such a market. If there was, then plaintiffs should recover, for such articles or items, the market value of which, if any, they have proven to your satisfaction, as in that event they would be held to the proof of the market value, and could not recover the real or actual value of such article. If you find for the plaintiffs you will assess the amount of damages which they should recover, and add thereto interest at the rate of eight per cent. per annum from the date of the destruction of the property up to the present time. If you find for the defendant you will simply so say by your verdict.

T. S. MAXEY, *Judge.*

Endorsed: No. 27. Malin and Colvin *vs.* The Pacific Express Co. Charge of the court. Filed Oct. 6th, A. D. 1888. W. E. Turner, clerk.

50 *Jury Verdict.*

In the Circuit Court of the United States for the Western District of Texas, at El Paso. October Term, 1888.

MALIN & COLVIN, Plaintiffs,
vs.
THE PACIFIC EXPRESS COMPANY, Defendant.

We, the jury in the above case, find in favor of the plaintiffs, and assess the damages at the sum of four thousand three hundred ($4,300) dollars, with interest from the 17th day of June, A. D. 1886.

GEORGE RUSSELL, *Foreman.*

[Endorsed:] No. 27. Malin and Colvin *vs.* Pacific Express Co. Verdict of jury. Filed this 6 day of Oct., A. D. 1888. W. E. Turner, clerk.

Judgment.

MALIN and COLVIN
vs.
PACIFIC EXPRESS COMPANY.

On this the 6th day of October, A. D. 1888, this case was regularly reached on the docket of this court and called for trial. Then came both parties and announced themselves ready for trial. Then came on to be heard defendant's exceptions to plaintiffs' petition, when defendant's general exception and his first, second, and third special exceptions were overruled; to which ruling of the court the defend-

ant, in open court, excepts; and the fourth special exception as to the matters presented was sustained, and plaintiff allowed to
51 amend at once so as to meet said exception.

And then came on to be heard plaintiffs' exception to defendant's plea in reconvention and setting up a counter-claim, which, being heard, was by the court sustained; to which ruling of the court the defendant in open court excepted.

Then came a jury of good and lawful men of the western district of Texas, to wit, George Russell, foreman, and eleven others, who, having been duly selected, empaneled, and sworn, and having heard the evidence, argument of counsel, and charge of the court, retired from the bar to consider of their verdict.

And afterwards came the same jury and returned into open court the following verdict, to wit:

In the Circuit Court of the United States for the Western District of Texas, at El Paso. October Term, 1888.

MALIN and COLVIN, Plaintiffs,
vs.
THE PACIFIC EXPRESS COMPANY, Defendant.

We, the jury in the above case, find in favor of the plaintiffs, and assess the damages at the sum of four thousand three hundred ($4,300) dollars, with interest from the 17th day of June, A. D. 1886.

GEORGE RUSSELL, *Foreman.*

It is therefore considered, ordered, adjudged, and decreed by the court that the plaintiffs, Sam. Malin and George Colvin, partners doing business under the name and style of Malin and Colvin, do have and recover of and from the defendant, The Pacific Express Company, the sum of four thousand three hundred dollars,
52 and the further sum of seven hundred and ninety-two dollars and fifteen cents, interest thereon since the 17th day of June, 1886, at 8 per cent. per annum, making in all the sum of five thousand and ninety-two dollars and fifteen cents, with all costs of this suit, hereinafter to be taxed; for which let execution issue.

And then came the plaintiffs and remit of and from the foregoing judgment the sum of four hundred and thirty-five dollars and fifty cents, leaving said judgment, as above rendered, to stand for the sum of four thousand six hundred and fifty-six dollars and sixty-five cents in favor of the said plaintiffs and against the said defendant; for which execution may issue.

Def't's Bill of Exceptions to the Charge of the Court.

In Circuit Court of the U. S. for the W. D. of Tex., at El Paso.
Oct. Term, 1888.

MALIN & COLVIN
vs.
THE PACIFIC EXPRESS CO. } No. 27.

Now comes the def't and excepts to the charge of the court to the jury, wherein and whereby the jury are instructed to find for plaintiffs, if at all, the value of the goods and property, together with 8 % interest thereon from the time and date of such said destruction. Def't says and represents to the court that plaintiffs, having failed to sue and pray for interest, are not entitled and ought not to recover such said interest; that the same is not a legal incident to the character of debt and damages herein sued for, and therefore, unless sued and prayed for, is not recoverable, and for said reasons
53 def't objects and excepts to that portion of the charge of the court, and tenders herewith its bill of exception thereto and thereof, and asks that the same be signed and filed herein and made a part of the record in this cause, this 8th day of Oct., 1888.

T. S. MAXEY, *Judge.*

Endorsed: No. 27. Malin and Colvin *vs.* The Pacific Ex. Co. Def't's bill of exception to the charge of the court. Filed this 8th day of October, A. D. 1888. W. E. Turner, clerk, by C. A. Richardson, deputy.

Bill of Exceptions Tendered by Def't.

In the Circuit C't of the W. D. of Tex. at El Paso. Oct. Term, 1888.

MALIN & COLVIN
vs.
THE PACIFIC EXPRESS CO. } No. 27.

Now comes the def't in said above cause and excepts to that portion of the charge of the court to the jury relative and appertaining to def't's interposition and allegation of contributory negligence upon the part of plaintiffs by reason of the careless, negligent, and reckless exposure and suspension of an highly inflammable oil lamp in the said stable, said portion of said charge relative to such said defence and the adjustment and hanging of said lamp as aforesaid herein and hereby objected and excepted to being in words as follows: "The def'ts claim that plaintiffs were guilty of negligence as to the location of the lamp in the building. Upon this point you are instructed that, as the managers of said building, the plaintiffs had the right to place the lamp where, in their own judg-
54 ment, it would best subserve their own purposes and conveniences, and def't is not in a position to complain if its own negligence or the negligence of its servants caused the fire."

Def't says that if said lamp was so suspended, placed, and hung in such negligent, careless, and dangerous place and manner as to require more than usual and ordinary care and caution upon the part of def't or any one else going in and about such said livery stable and building, though so hung and placed before the fire, that def't could complain, and such facts would be and constitute contributory negligence upon the part of plaintiffs, and would be a good and sufficient defense for def't herein and debar plaintiffs' right to recover herein, and that the court should have so charged the jury.

And def't tenders this its bill of exception to such said charge so given by the court to the jury, and asks that same be signed and filed herein and made a part of the record in this said cause this 8th day of Oct., 1888.

T. S. MAXEY, *Judge.*

Endorsed: No. 27. Malin & Colvin *vs.* The Pacific Express Co. Bill of exceptions tendered by def't. Filed this 8th day of October, A. D. 1888. W. E. Turner, clerk, by C. A. Richardson, deputy.

55 *Motion to Remit.*

In the Circuit Court of the United States for the Western District of Texas, at El Paso.

MALIN and COLVIN
vs.
THE PACIFIC EXPRESS COMPANY.

Now come the plaintiffs and pray for leave to enter a remittitur for the sum four hundred and thirty-five dollars and fifty cents of the amount of the judgment rendered in this case on the 6th day of October, 1888, so that said judgment may stand for the sum of four thousand six hundred and fifty-six dollars and sixty-five cents, and that said remittitur be entered and take effect of and for the 6th day of October, 1888, and that said judgment be entered for said last-named sum in favor of said plaintiffs and against said defendant.

SEXTON AND SMITH,
Att'ys for Pl'ffs.

[Endorsed:] No. 27. Malin & Colvin *vs.* The Pacific Express Co. Motion to remit. Filed Oct. 8, 1888. W. E. Turner, clerk.

Order of Court Allowing Remittitur.

MALIN and COLVIN
vs.
THE PACIFIC EXPRESS COMPANY.

On this 8th day of Oct., 1888, came the plaintiffs in open court and pray the court for leave to enter now as on and for the 6th day

of October, 1888, a remittitur of four hundred and thirty-five dollars and fifty cents of the amount found by the jury and for which judgment was rendered in this case in favor of the plaintiffs and against the defendant.

56 And it appearing to the court that the plaintiffs had, on the 6th day of October, 1886, voluntarily remitted said amount of and from said judgment, but it not appearing to have been done in open court or with leave of the court—

It is now ordered and adjudged by the court that the said plaintiffs be permitted now on this day as and for the 6th day of October to remit of and from the amount of five thousand and ninety-two dollars and fifteen cents (the amount of principal and interest found for the plaintiffs by the verdict of the jury in this case) the sum of four hundred and thirty-five dollars and fifty cents, leaving the sum of four thousand six hundred and fifty-six dollars and sixty-five cents for which the said plaintiffs are to have judgment.

It is therefore considered and ordered, adjudged, and decreed by the court that the judgment entered in this case on the 6th day of October, 1888, be corrected and reformed, so that the said plaintiffs, Sam. Malin and George H. Colvin, upon the verdict of the jury and the remittitur hereinabove entered, do have and recover of and from the said defendant, The Pacific Express Company, the sum of four thousand six hundred and fifty-six dollars and sixty-five cents, together with all costs of suit in this behalf expended and hereinafter to be taxed, for which let execution issue, and that this judgment take effect and be of force of and from the 6th day of October, 1888.

57 *Motion for New Trial.*

In Circuit C't of the United States for the W. D. of Tex., at El Paso.
Oct. Term, 1888.

MALIN & COLVIN
vs.
THE PACIFIC EXPRESS CO.

Now comes the defendant in said above cause & moves & asks the court to set aside & vacate the verdict of the jury and judgment rendered and entered herein on October 6th, 1888, & grant it a new trial in this said cause, & in support & as grounds for the granting of this motion def't respectfully represents—

1st. That the court erred in permitting plaintiffs to prove the value of articles alleged to have been destroyed and allowing such testimony and evidence to go to the jury over the objection of def't when plaintiffs had not first established and proven that there was not an existing market value of such said property at the time and place of such destruction thereof, the market value being the true, correct, and proper measure of damages, & no other value can in

law be proven as a measure of damages unless there be no existing market value.

2nd. That the court erred in his instruction to the jury, charging them in effect that they should find for plaintiff, if at all, the value of such property destroyed at the time and place, together with 8 % per annum interest thereon from the date of such said destruction, plaintiff not having sued and prayed for interest; that in unliquidated damages such said interest is not a legal incident thereto, none being asked by plaintiffs as such said damages, and therefore such said charge gave an incorrect measure of damages in this case.

58 3rd. That the court erred in charging the jury in effect that plaintiff would not be guilty of contributory negligence, as alleged by def't, because of negligently, carelessly, and dangerously hanging and suspending a highly inflammable oil lamp in such way and manner as directly to cause and contribute to the accident leading to the injury and loss herein alleged to have occurred, and that plaintiffs, as the managers of such said building, had a right to place where, in their own judgment, it would best subserve their own purposes and convenience, and that def't could not complain.

4th. That the verdict of the jury and the judgment herein is not responsive to and in accordance with the instruction of the court in this, that the jury should, by their verdict, under the instruction of the court, have found a sum certain and a specific amount, naming same, whereas by their verdict the damages were left to be and were in truth and in fact assessed by the clerk and pl'ffs' att'ys, and the judgment herein rendered and entered is not upon and in accordance with the verdict of the jury, but is different from and based upon and, in fact, a judgment based upon an estimation and assessment of damages made by the clerk of this court and plaintiffs' attorneys, as aforesaid, which said assessment and finding should have been made and done by the jury and not by counsel or the clerk.

That the verdict of the jury and said judgment is hereby specially referred to, and def't asks that same be made and con-
59 sidered a part of this said ground for the granting of this motion.

5th. That the verdict herein and the judgment thereupon granted is contrary to the evidence.

6th. That the verdict returned herein and the judgment rendered and entered herein is contrary to the law.

Premises considered, def't prays the court to set aside the verdict of the jury and the judgment herein rendered and grant a new trial in this said cause.

BALL & BURNEY AND
J. M. McCORMICK,
Att'ys for Def't.

[Endorsed:] No. 27. Malin & Colvin *vs.* The Pacific Express Co. Def't's motion for new trial. Filed this 9th day of October, A. D. 1888. W. E. Turner, clerk, by C. A. Richardson, deputy.

Order Denying New Trial.

MALIN and COLVIN
vs.
THE PACIFIC EXPRESS COMPANY. } No. 27.

On this the 9th day of October, 1888, came on to be heard the motion of the defendant, The Pacific Express Company, for a new trial; which, having been heard and considered, is by the court in all things overruled; to which ruling of the court the defendant, in open court, excepts and gives notice that it will prosecute on writ of error to the Supreme Court of the United States.

60 *Affidavit of Witness G. W. Gorbutt.*

OCT. 17, 1887.

On this day personally appeared before me J. W. Gorbutt, who deposes and says that he was a witness in the case of Malin and Colvin *vs.* The Pacific Express Co., and is entitled to compensation as follows: To 3 days' attendance @ $1.50 per day, $4.50.

G. W. GORBUTT.

Subscribed and sworn to before me this 17th day of Oct., 1887.
W. E. TURNER, *Clerk.*

EL PASO, TEXAS, *Oct. 10th*, 1888.

MALIN and COLVIN
vs.
PACIFIC EXPRESS CO.

On this day personally appeared before me V. F. Cook, who, being by me duly sworn, deposes and says that he is a witness for the plaintiff- in the above cause and was duly summoned to appear and testify in behalf of said plaintiff-, and that he has actually attended said court and is entitled to compensation as follows: To 8 days' personal attendance @ $1.50, $12.00, being from Oct. 1st, 1888, to Oct. 8th, 1888, inclusive.

V. F. COOK.

Sworn to and subscribed before me this 10th day of Oct., 1888.
W. E. TURNER, *Clerk,*
By C. A. RICHARDSON, *Deputy.*

Endorsed: No. 27. Malin and Colvin *vs.* Pacific Express Co. Affidavit of witness V. F. Cook. Filed this 10th day of Oct., 1888. W. E. Turner, clerk.

61 UNITED STATES OF AMERICA, }
Western District of Texas. }

In Circuit Court of the United States within and for the Western District of Texas, at El Paso.

On this day personally appeared before me Jube Johnson, and he, being by me duly sworn, deposes and says that he is a witness in the case of Malin and Colvin *vs.* The Pacific Express Company, and that he has been duly summoned to appear and testify for the plaintiff in the above cause; that he is entitled to compensation therefor as follows, to wit:

Actual attendance on this term of the court six days, being from Oct. 1st, 1888, to Oct. 6th, 1888, inclusive, 6 days @ $1.50	$9 00
Travel, 387 miles, @ 10c., counting one way	38 70
	$47 70

JUBE JOHNSON.

Sworn to and subscribed to before me this sixth day of October, A. D. 1888.

W. E. TURNER, *Clerk.*

Endorsed: No. 27. Malin and Colvin *vs.* The Pacific Express Co. Affidavit of Jube Johnson, witness. Filed October 6th, 1888. W. E. Turner, clerk, by C. A. Richardson, deputy.

62 *Writ of Error Bond.*

Know all men by these presents that we, The Pacific Express Company, as principal, and —— —— and —— ——, as sureties, are held and firmly bound unto Malin and Colvin, a firm composed of Sam. Malin and George Colvin, in the full and just sum of eight thousand dollars, to be paid to the said Malin and Colvin, a firm composed of Sam. Malin and George Colvin, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a term of the circuit court of the United States for the western district of Texas, at El Paso, in a suit pending in said court between Malin and Colvin, a firm composed of Sam. Malin and George Colvin, as plaintiff-, and said The Pacific Express Company, as defendant, a judgment was rendered against the said The Pacific Express Company, and the said The Pacific Express Company have obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the afore-

said suit, and a citation, directed to the said Malin and Colvin, a firm composed of Sam. Malin and George Colvin, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

63 Now, the condition of the above obligation is such that if the said The Pacific Express Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain *if* full force and virtue.

THE PACIFIC EXPRESS COMPANY,
By J. M. McCORMICK, *Its Attorney.*
J. C. O'CONNER.
J. D. A. HARRIS.

Approved this 23rd day of November, 1888.
T. S. MAXEY, *U. S. Judge.*

THE STATE OF TEXAS, }
County of Dallas. }

I, J. H. Stewart, clerk district court, Dallas county, hereby certify that I consider the sureties whose names appear to the within bond good and ample security for the amount therein specified, and that I would take and approve the same if presented to me for that purpose.

Witness my official seal and signature, at office, in Dallas, this Nov. 20, 1888.

[SEAL.] J. H. STEWART,
Clerk Dist. Court, Dallas Co.

Endorsed: Pacific Express Co., pl'ff in error, *vs.* Malin & Colvin, def'ts in error. Writ of error bond. Filed this the 30th day of November, A. D. 1888. W. E. Turner, clerk, by C. A. Richardson, deputy.

64 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, before you or some of you, between Malin & Colvin, a firm composed of Sam. Malin and George Colvin, plaintiffs, and The Pacific Express Company, defendant, a manifest error hath happened, to the great damage of the said The Pacific Express Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid

in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

65 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the 23 day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

W. E. TURNER,
Clerk of the Circuit Court of the United States for the W. D. of Tex., at El Paso,
By C. A. RICHARDSON, *Deputy.*

Allowed by—
T. S. MAXEY, *U. S. Judge.*

This 23rd day of November, 1888.

Endorsed: Pacific Express Co., pl'ff in error, *vs.* Malin & Colvin, def'ts in error. Writ of error. Filed Nov. 30th, 1888. W. E. Turner, clerk, by C. A. Richardson, deputy.

66 The United States of America to Malin and Colvin, a firm composed of Sam. Malin and George Colvin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, at El Paso, wherein The Pacific Express Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23rd day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

T. S. MAXEY, *U. S. Judge.*

Endorsed: Pacific Express Co., pl'ff in error, *vs.* Malin and Colvin, def'ts in error. Citation.

67 *Bill of Costs.*

MALIN and COLVIN
vs.
THE PACIFIC EXPRESS COMPANY. } No. 27.

1887.				
Ap'l 4.	Fil'g, cert'g, & ent'g trans.		40	
7.	Order of continuance		15	
July 14.	Issuing 1 sub. for def't	(2 wit's)	50	
Oct. 13.	" 3 subs. "	(9 ")	1 50	
	Fil'g and ent'g 4 marshals' returns		1 00	
	3 certificates, pay't of witnesses		1 50	
	Certified cost bill		50	
	Two orders of continuance		30	
1888.				
Ap'l 5.	" " pleading & cont.		30	
	Fil'g and ent'g def't's amend. ans.		25	
1888.				
Oct. 1.	" app. for sub.		10	
	Iss'g sub. V. F. Cook, fil'g & ent'g return		50	
	Fil'g and ent'g 1st amend. orig. petition		25	
5.	" " " 1st supplemental "		25	
	" " " 2nd amend. orig. ans.		25	
6.	" app. for sub.		10	
	Issuing sub., McW'ms, fil'g & ent'g return		50	
	Fil'g charge & verdict		20	
	Swearing 12 jurors		1 20	
	" 8 witnesses		80	
	Ent'g judgment, 6 fol., @ 15		90	
8.	Fil'g 2 bills of exceptions		20	
9.	" & ent'g motion for new trial		25	
	" " " to remit		25	
	Ent'g order overruling new trial		30	
	" " remitting		90	
	Docket fee, &c.		3 00	
	" " (motions)		1 00	
	Ent'g notice of appeal		15	
	2 aff. witnesses, fil'g same		1 20	
	Certified cost bill		50	
Nov. 30.	Filing 4 appeal papers		40	
	Issuing writ of error		1 00	
	" copy for def't		1 00	
	Making 2 copies of cit., 3 fol. ea 60		1 20	
				22 80
68	Brought over		22 80	
	Certificate and seals to same		1 00	
	Ent'g returns		50	
Dec. 5.	Transcript for Supreme Court, 165 folios @ 20c.		33 00	
				57 30
	Marshal's fees:			
	Summoning 9 witnesses @ 50		4 50	
				4 50
	Witnesses' fees:			
Oct., 1887.	G. W. Gorbutt, 3 days @ 1.50		4 50	
" 1888.	V. F. Cook, 8 " " 1.50		12 00	
" 1888.	Jube Johnson, 6 " " 1.50		9 00	
	100 miles' travel @ 10c.		10 00	
				35 50
				97 30
	Cr. by cash on deposit			25 00
				$72 30

I, W. E. Turner, clerk of the U. S. circuit court for the western district of Texas, do hereby certify that the above and foregoing is a true and correct cost bill, and also that it is a true copy of the cost bill which I have this day attached to the transcript to the Supreme Court.

Witness my hand and seal, at El Paso, this 6th day of December, A. D. 1888.

[The Seal of the U. S. Circuit Court, El Paso, Western Dist. Texas.]

W. E. TURNER, *Clerk*,
By C. A. RICHARDSON, *Deputy*.

69 UNITED STATES OF AMERICA, }
Western District of Texas. }

I, Geo. Wythe Baylor, clerk of the circuit court of the United States of America for the western district of Texas in the 5th circuit, do hereby certify that the writing annexed to this certificate is a true copy of the original on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of El Paso, in the western district of Texas, the 17th day of September, in the year of our Lord 1889, and of the Independence of the United States 113th.

[The Seal of the U. S. Circuit Court, El Paso, Western Dist. Texas.]

GEO. WYTHE BAYLOR,
Clerk U. S. C., W. D. T.

70 No. 27.

The United States of America to Malin & Colvin, a firm composed of Sam. Malin and George Colvin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, at El Paso, wherein The Pacific Express Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23rd day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

T. S. MAXEY,
U. S. Judge.

On this 8th day of January, in the year of our Lord one thousand eight hundred and eighty-nine, personally appeared Chester Baker

before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Sam. Malin in person.

CHESTER BAKER,
Dep't. U. S. Marshal.

Sworn to and subscribed the 9th day of January, A. D. 1889.

W. E. TURNER,
U. S. Clerk at El Paso.
By C. A. RICHARDSON, *Deputy.*

71 STATE OF TEXAS, }
County of El Paso. }

On this 14th day of January, A. D. 1889, personally appeared R. L. Ball before me, who, after being by me duly sworn, deposes and says that he delivered a true copy of the within citation to George Colvin in person on the 10th day of January, A. D. 1889.

R. L. BALL.

Sworn to — subscribed before me by R. L. Ball on this the 14th day of January, A. D. 1889.

[SEAL.] FRANK E. HUNTER,
Notary Public in and for El Paso County, Texas.

72 [Endorsed:] No. 27. Pacific Express Co., pl'ff in error, *vs.* Malin & Colvin, def't in error. Citation. Fees, 90 cts.

73 I, W. E. Turner, clerk of the U. S. circuit court for the western district of Texas, at El Paso, do hereby certify that the above and foregoing 66 pages of manuscript contain a full, true, and correct transcript of the record and proceedings in the case of Malin and Colvin *vs.* The Pacific Express Company.

Witness my hand and seal of said court, at El Paso, this 5th day of December, A. D. 1888.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, El Paso.]

W. E. TURNER, *Clerk,*
By C. A. RICHARDSON, *Deputy.*

Endorsed on cover: W. Texas C. C. U. S. No. 1301. The Pacific Express Company, plaintiff in error, *vs.* Malin & Colvin, a firm composed of Sam. Malin and George Colvin. Filed October 7, 1889.

OFFICE SUPREME COURT U. S.
FILED.
NOV 25 1889
JAMES. H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

THE PACIFIC EXPRESS COMPANY,
Plaintiff in Error,

vs.

SAM. MALIN AND GEORGE COLVIN,
Defendants in Error.

No. 1301.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Motion to dismiss and affirm.

JOHNS & McKNIGHT,
For Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

THE PACIFIC EXPRESS COMPANY,
Plaintiff in Error,

vs.

SAM. MALIN AND GEORGE COLVIN,
Defendants in Error.

No. 1301.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Motion to dismiss and affirm.

BRIEF FOR PLAINTIFF IN ERROR.

First. The attention of the Court is invited to the fact that the case of Pacific Express Co. *v.* Malin, 131 U. S., 395,—referred to in the opening paragraph of the brief in support of this motion—has no connection with or relevancy to the case at bar. The latter case arises between different parties, and upon a different cause of action.

Second. The verdict of the jury, and the judgment of the court, duly entered, were for $5,092.15. (Record,

p. 27). It is submitted that this judgment determines the jurisdictional amount.

On the day following said judgment, and after bills of exceptions for the purpose of this writ of error had been signed, the plaintiff was allowed to remit $435.50, and the court ordered that said judgment "be corrected and reformed" to $4,656.65. (p. 30). But the court could not destroy the record, and it shows a formal judgment for the jurisdictional amount, and the institution of proceedings looking to this appeal.

It is submitted that the plaintiff below should not be allowed to defeat the right of appeal after judgment, and after the institution of proceedings in error, by a deduction from the amount, any more than he should be allowed to acquire it by an addition to the amount. The true rule is stated in Thompson *v.* Butler, 95 U. S., 694, which held that a *remittitur* entered *after judgment* will not divest this Court of jurisdiction, and particularly after the proper steps had been taken looking to the transfer of the cause.

The *remittitur* in this case was made under Article 1352, Rev. Stat. of Texas, 1879, which provides as follows:

"Any person in whose favor a judgment has been rendered may, in open court, remit any part of such judgment, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment, after deducting the amount remitted."

This statute, undertaking as it does to regulate the subject of a *remittitur* after judgment, is exclusive. Clearly, it does not provide that the judgment shall be either "corrected" or "reformed." We submit that in ordering that the judgment "be corrected and reformed," the court below exceeded its authority under said statute.

Third. The "reformed" judgment in the court below, after deduction of the sum remitted, was $4,656.65, (Record, p. 30). The counter claim set out in the plea was for $8,000.00, (p. 22). It was demurred to, (p. 23), the demurrer was sustained, (p. 27), and it is now before this Court upon the exception to said ruling.

The sum of said two amounts is $12,656.65, and this is the matter in dispute on the writ of error.

Hilton *v.* Dickenson, 108 U. S., 165, 175.
Bradstreet Co. *v.* Higgins, 112 U. S., 227.
Railroad Company *v.* Bank, 118 U. S., 608.

The objections urged against the counter claim in the brief filed in support of the motion, are not supported by the record or the authorities.

1. It is stated that the counter claim "seeks damages *for slander of character* amounting to $5,000." This statement is erroneous, as shown by the record, (p. 22).

2. It is argued that the counter claim "was inserted merely to give color to the jurisdiction of this Court." This is manifest error. Plaintiff's claim was for $4,656.71, (Record, p. 20), and the cause of action arose on June 17, 1886, (p. 16). The sum of said claim and of the legal interest thereon, 8 per cent., to date of filing the counter claim was $5,513.52, which was ample for purposes of jurisdiction without the counter claim.

3. The cases cited, Lee *v.* Watson, and Bowman *v.* Railroad Company, are not in point. In both there was an amendment as to the amount of damages claimed *by the plaintiff below*, who was also the plaintiff in error here. In the former the judge's certificate, and in the latter a stipulation, substantially *admitted* that the increased amounts were inserted for the purpose of giving this Court jurisdiction.

There is no precedent for such a motion as this in

respect of a counter claim. It is submitted that, on principle, it should be held that a counter claim, which is made a part of the merits of the controversy by the pleadings, the amount of which is undisputed, and which is disallowed, must be taken as valid when considered on the question of jurisdictional amount. In such a connection, its validity has always remained unquestioned.

Fourth. The motion to affirm is obviously as baseless as the motion to dismiss. The counter claim was filed under Article 650 of the code of Texas, (Rev. Stat., 1879), which provides as follows:

"Nothing in the preceding article shall be so construed as to prohibit the defendant from pleading in set-off any counter claim found on a cause of action arising out of, or incident to, or connected with, the plaintiff's cause of action."

As above stated, said counter claim is before this Court on exception to the judgment below sustaining the demurrer to it, and it constitutes a most important item of the case of the plaintiff in error. We submit that the plaintiff in error is entitled to be heard on the merits in support of said exception, and to show that the counter claim is valid in law and conformable to the statute as construed by the courts of the State of Texas.

As to the two bills of exceptions, supposing them to be open to the objections suggested in the brief in support of this motion, obviously it is not therefrom "manifest" that "the writ was taken for delay only"—as alleged in the motion—within the meaning of Rule 6, Subdivision 6.

The absence from the record of a showing that proper exceptions were taken at the trial may be the fault of the clerk of the circuit court, which can be corrected by

writ of certiorari, now that it has been pointed out. [Counsel for plaintiff in error have not had time since date of their employment to ascertain the facts in this regard.]

The cases cited in the brief supporting the motion, page 6, are not relevant to the case at bar, for the reason that the language of the court in the charge to the jury, which is excepted to, presented distinct propositions of law and had reference to facts set out in the pleadings. It is therefore unnecessary that any of the evidence should appear in the record.

Pennock *v.* Dialogue, 2 Pet., 1, 15.
Jones *v.* Buckell, 104 U. S., 554, 556.

For the foregoing reasons, we ask the Court to deny the motion to dismiss and affirm.

Respectfully submitted:

JOHN JOHNS,
D. A. McKNIGHT,
For Plaintiffs in Error.

In Supreme Court U. S.
FILED,
NOV 1 1889
JAMES H. McKENNEY,
CLERK.

[OCTOBER 29, 1889.]

Supreme Court of the United States.

THE PACIFIC EXPRESS COMPANY
vs.
MALIN & COLVIN.
} No. 1301.

Motion to Dismiss or Affirm.

W. HALLETT PHILLIPS,
For Defendants in Error.

R. O. Polkinhorn, Printer.

Supreme Court of the United States.

THE PACIFIC EXPRESS COMPANY
vs.
MALIN & COLVIN.
No. 1301.

Motion to Dismiss or Affirm.

The defendants in error, in the above entitled cause, move the court to dismiss the writ of error for want of jurisdiction, the matter in dispute being less than $5,000. They unite therewith a motion to affirm, on the ground that even if the court should decide that it possesses jurisdiction, it is apparent that the questions involved are so frivolous as not to need further argument, and that the writ of error is sued out for delay only.

W. HALLETT PHILLIPS,
for Motion.

The above motions will be submitted three weeks after service.

W. HALLETT PHILLIPS,
for Motion.

Brief in Support of Motion.

On November 26, 1888, this Court, in the case of *Pacific Express Co.* vs. *Malin*, sustained a motion to dismiss on the ground that the amount involved was not sufficient. This motion was submitted November 19, and under the rules had to be served three weeks before submission. There was no opposition to the motion. 131 U. S., 395.

That case was an action against the Express Company for injury by fire to a building belonging to the plaintiffs.

The present suit was between the same parties and brought to recover for a loss of the contents of the building.

By the plaintiffs' "first amended original petition," an itemized statement of the loss was made and the amount claimed is $4,656.71. R. 16–20.

In answer to this, defendant filed its "second amended original answer." It denied liability and set up the defense of contributory negligence.

In its amended answer for the first time, the company also, "by way of counter-claim and reconvention" seeks damages for *slander of character*, amounting to $5,000, and $3,000 attorneys' fees alleged to have been paid in defending the suit and those instituted "by di-vers other parties." R. 20–22.

On the day after this counter-claim was filed, an exception to it was sustained. R. 26.

There was a verdict for plaintiffs, on which, after a *remittitur*, final judgment was rendered for $4,656.65. R. 29–30.

From this judgment the defendant took his writ of error.

The ground for dismissal is that it is manifest that the amount set up in the counter-claim, by virtue of which alone is it pretended this Court can review the judgment, was inserted merely to give color to the jurisdiction of this Court, and that it should not be regarded as sufficient for that purpose.

No other object than the one we have indicated can be inferred. The counter-claim is so preposterous, as not to need argument. It was introduced for the first time *after the plaintiffs had, by their amended petition reduced their demand to a sum below the jurisdiction of this court.* By their *first* petition they claimed an amount exceeding $5,000 and the defense *then interposed* by the defendant was simply a denial of liability—the only *real* controversy. R. 1-6.

That a case will be dismissed where it is apparent that the amount inserted was for the sole purpose of giving this court jurisdiction, was decided in *Lee* v. *Watson*. There the original declaration showed that the amount in controversy did not exceed $1,000. Afterwards an amendment was allowed increasing the damages claimed to an amount sufficient to bring the case here.

On motion to dismiss, this Court said they could look into the Record to ascertain what was the real amount involved, and having ascertained it was not sufficient, they concluded that the amendment was made for the purpose of bringing the case within the appellate jurisdiction. Held, that the jurisdiction was not acquired from the amendment. The writ of error was dismissed.

I Wall 337.

This case is referred to and followed in that of *Bowman* vs. *Chicago, &c., R. R.*

There plaintiff, by his original petition, claimed damages to the amount of $1,200, but, shortly before decision, amended his declaration so as to increase the damages demanded to $10,000.

The Court in dismissing the case say the amendment was manifestly sought, not in the expectation of recovering more than was originally claimed, but to give color to the jurisdiction of this Court. The case was not materially different from *Watson* v. *Lee*, where the dismissal was for the reason that the amendment was made for the sole purpose of giving color of jurisdiction. 115 U. S. 611.

The facts appearing in the present record are clearer, if anything, than those contained in the two cited cases, to show that the amendment by which the so-called counter-claim is made, was only for the purpose of bringing the case here.

(2). Even should the Court conclude that it has jurisdiction, the case is a plain one for affirmance. It is evident that the writ of error is brought for delay only.

That the judge below was right in sustaining the exception to the counter-claim is so manifest, that we do not think we are called on to argue the point.

If we treat the whole case open by reason of the counter-claim, it is equally clear that the judgment in favor of the plaintiff was correct.

There is no bill of exceptions which can be considered by this Court.

It is true there is found in the Record a paper entitled "Deft's Bill of Exceptions to the charge of the

Court." This does not purport to have been tendered at the trial.

The verdict was rendered Oct. 6. The bill of exceptions was signed Oct. 8, and declares "Now comes the defendant and excepts to the charge of the Court * * * and for said reasons defendant objects and excepts to that portion of the charge and tenders herewith its bill of exceptions and asks that the same be filed and signed." R. 28.

The same objection is applicable to the paper entitled "Bill of Exceptions tendered by Deft." This was also signed Oct. 8, and declares "Now comes the defendant and excepts to that portion of the charge of the Court * * * and defendant tenders this its bill of exceptions to such said charge so given by the Court to the jury and asks that same be signed." R. 28.

These are not proper bills of exception. They are not directed to matters of exception taken pending the trial and ascertained before the verdict.

To make them available it should have appeared that the exceptions are made to the charge while the jury was at the bar.

Phelps vs. *Mayer*, 15 How., 160 ;
United States vs. *Cary*, 110 U. S., 51.

The first exception relates merely to the interest recovered.

The other exception is to a portion of the charge, as to the location of a certain lamp in the building; but there is no evidence given to show how far applicable the criticism made upon it by defendant is well founded.

When error is assigned upon instructions given, the bill must set forth so much of the evidence as tends to prove the facts out of which the question is raised and to which the instructions apply, otherwise the bill will not be considered. *United States* vs. *Hough*, 103 U. S., 73; *Worthington* vs. *Mason*, 101 Id., 194.

In order to discourage frivolous writs of error, this Court has the power, under its rules, to impose a penalty of damages, when a case is brought here for delay only. A plainer case than the present, for the exercise of the rule, could not be presented.

We submit that the writ of error should be dismissed, or the judgment affirmed with damages.

W. HALLETT PHILLIPS,
For Defendants in Error.